

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

CHARLES NEWTON.

Case No. 2:16-cv-01705-RFB-PAL

**Plaintiff,**

V.

ANDREW WINTERSTEEN.

(Mot. – ECF No. )

Defendant.

12 This matter is before the court on Plaintiff Charles Newton's Motion for Appointment of  
13 Counsel (ECF No. 9) and Motion for Mediation Conference (ECF No. 29). Also before the court  
14 is Defendants' Motion to Strike (ECF No. 46). These Motions are referred to the undersigned  
15 pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 of the Local Rules of Practice.

## BACKGROUND

Plaintiff is a *pro se* prisoner in the custody of the Nevada Department of Corrections. Plaintiff has also received permission to proceed *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915 and LSR 1-1 of the Local Rules of Practice. *See* IFP Application (ECF No. 8); May 31, 2017 Order (ECF No. 27).

This case arises from Plaintiff's allegations, pursuant to 28 U.S.C. § 1983, that lifetime supervision for convicted sex offenders is unconstitutional. In July 2016, Plaintiff commenced this action by filing an IFP application and a proposed complaint naming Defendants Andrew Wintersteen, Plaintiff's parole officer, and the Nevada Parole Board. Upon review of the complaint, the court determined that Plaintiff's claim regarding his lifetime supervision survived screening, but dismissed the remaining claims. *See* Screening Order (ECF No. 10). The court stayed the case for 90 days to allow the parties an opportunity to settle their dispute through the Inmate Early Mediation Program before the filing of an answer or starting the discovery process.

*Id.* at 5; see also Mar. 31, 2017 Order (ECF No. 13) (setting inmate early mediation conference). The parties did not reach a settlement during the mediation session; thus, the court-appointed mediator returned this case to the normal litigation track. See Apr. 28, 2017 Mins. of Proceedings (ECF No. 16); Status Report (ECF No. 24).

After Plaintiff filed the current case, he filed a second lawsuit in August 2016 alleging that lifetime supervision for convicted sex offenders is unconstitutional but he named different defendants, the State of Nevada and Attorney General Adam Paul Laxalt. *See Newton v. State of Nevada, et al.*, 16-cv-1915-JAD-CWH. The presiding district judges agreed that the two cases are related and ordered consolidation. *See* May 17, 2017 Order (ECF No. 20).

On May 31, 2017, the court entered an Order (ECF No. 27) directing electronic service of the Complaint on the Nevada Office of the Attorney General (“Attorney General”) and instructing that a notice be filed with the court indicating the names of the defendants for whom the Attorney General accepts service, and those it does not. *Id.* ¶¶ 4, 6. Plaintiff was also given leave to file an amended complaint. *Id.* ¶ 12. Plaintiff filed a First Amended Complaint (ECF No. 30) on June 6, 2017, which narrowed the defendants to Wintersteen alone. On June 21, 2017, the Attorney General accepted service on behalf of Defendant Wintersteen. See Notice Acceptance of Service (ECF No. 35). Wintersteen filed an Answer (ECF No. 45) on July 31, 2017.

## DISCUSSION

## I. PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL

A litigant in a civil rights action does not have a Sixth Amendment right to appointed counsel. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (citing *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981)); *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982). Pursuant to 28 U.S.C. § 1915(e)(1), the court may ask an attorney to represent a litigant proceeding *in forma pauperis*. *Id.* This statute does not require that the court appoint counsel or authorize the court to direct payment for a litigant’s attorney’s fees, it merely allows the court to request that an attorney represent an indigent litigant on a pro bono basis. See *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 304–05 (1989); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 798–804 (9th Cir. 1986).

1           The appointment of counsel is limited to cases presenting exceptional circumstances.  
2 *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004); *Aldabe v. Aldabe*, 616 F.2d  
3 1089, 1093 (9th Cir. 1980) (per curiam). The word “exceptional” is defined as “out of the ordinary  
4 course, unusual,” or “rare.” *See Oxford English Dictionary* (Oxford Univ. Press 2015). In  
5 deciding whether to appoint counsel, the court should consider: (1) the likelihood of success of the  
6 pro se party’s claims on the merits, and (2) the ability of the party to articulate claims pro se in  
7 light of the complexity of the legal issues involved. *Harrington v. Scribner*, 785 F.3d 1299, 1309  
8 (9th Cir. 2015); *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (finding that  
9 neither factor is controlling); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

10          Plaintiff’s Motion (ECF No. 9) asks the court to appoint counsel because his incarceration  
11 impedes his ability to litigate his case. Plaintiff has received permission to proceed IFP and he  
12 asserts that he is unable to afford counsel. He claims the substantive issues and procedural matters  
13 in this case are too complex for his comprehension and abilities. Counsel would assist Plaintiff in  
14 presenting his case and ease the court’s task of discerning the issues.

15          Plaintiff has not established that exceptional circumstances exist to justify the appointment  
16 of counsel. Plaintiff’s initial complaint alleged that lifetime supervision for convicted sex  
17 offenders is unconstitutional. The court determined that Plaintiff’s claim regarding his lifetime  
18 supervision survived screening. *See Screening Order* (ECF No. 10). Based on the record, the  
19 court is unable to assess the likelihood of success of Plaintiff’s claim on its merits. However, the  
20 court finds that the facts alleged and legal issues raised may involve a constitutional challenge, but  
21 are not so complex that Plaintiff is unable to present his case. Since commencing this action,  
22 Plaintiff has submitted and numerous motions to the court. He has demonstrated sufficient ability  
23 to write and articulate his requests. The court appreciates that it is difficult for pro se parties to  
24 litigate their claims and that almost every pro se party would benefit from representation by  
25 counsel. However, the court cannot require counsel to accept representation on a pro bono basis,  
26 and the number of attorneys available to accept a pro bono appointment is very small. The motion  
27 is denied.

1           **II. PLAINTIFF'S MOTION FOR MEDIATION CONFERENCE**

2           This Motion (ECF No. 29) asks the court to allow a second mediation session based on a  
3 new argument included in his amended complaint and the consolidation of his cases. Defendants  
4 did not respond to Plaintiff's motion.

5           The court created the Inmate Early Mediation Program to assist in the management of  
6 inmate civil rights cases. The court appoints attorneys to serve as impartial mediators who preside  
7 over mediations with inmate plaintiffs suing for constitutional violations related to their  
8 confinement pursuant to 42 U.S.C. § 1983. The core of Plaintiff's allegations in this case present  
9 a legal question—whether lifetime supervision for convicted sex offenders violates his  
10 constitutional rights. Mediators assist the parties in arriving at a settlement or achieving a better  
11 understanding of the case, but they do not decide the merits of the parties' legal arguments. It is  
12 not clear what Plaintiff expects would be accomplished from a second session. Pursuant to local  
13 practice the district judge will refer this case to me for a mandatory settlement conference after  
14 discovery has closed and any dispositive motions have been decided. Plaintiff's request for a  
15 second mediation session is denied at this time.

16           **III. DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S SECOND AMENDED COMPLAINT**

17           This Motion (ECF No. 46) asks the court to strike Plaintiff's Second Amended Complaint  
18 (ECF No. 45) because Plaintiff failed to seek or obtain defendant's consent or leave of the court  
19 to further amend his pleadings.

20           Rule 15 provides that a party may amend a pleading once "as a matter of course" within  
21 21 days after serving it. Fed. R. Civ. P. 15(a)(1)(A). After that, a party may amend its pleading  
22 only by leave of the court or with the opposing party's written consent. Fed. R. Civ. P. 15(a)(2).  
23 "It is well established that district courts have inherent power to control their docket." *Ready*  
24 *Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (quoting *Atchison, Topeka &*  
25 *Santa Fe Ry. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998); *Hernandez v. City of El Monte*,  
26 138 F.3d 393, 398 (9th Cir. 1998)). This includes the power to strike improperly filed items from  
27 the docket as a sanction for litigation misconduct. *See, e.g., id.* at 404–05; *Lazy Y Ranch Ltd. v.*  
28 *Behrens*, 546 F.3d 580, 586–87, 588 (9th Cir. 2008).

1 Accordingly,

2 **IT IS ORDERED:**

- 3 1. Plaintiff Charles Newton's Motion for Appointment of Counsel (ECF No. 9) and  
4 Motion for Mediation Conference (ECF No. 29) are **DENIED**.
- 5 2. Defendants' Motion to Strike (ECF No. 46) Plaintiff's Second Amended Complaint is  
6 **GRANTED**.
- 7 3. The Clerk of the Court is instructed to **STRIKE** Plaintiff's Second Amended  
8 Complaint (ECF No. 45) from the docket.

9 Dated this 9th day of August, 2017.

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12 PEGGY A. SEIDEN  
13 UNITED STATES MAGISTRATE JUDGE  
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